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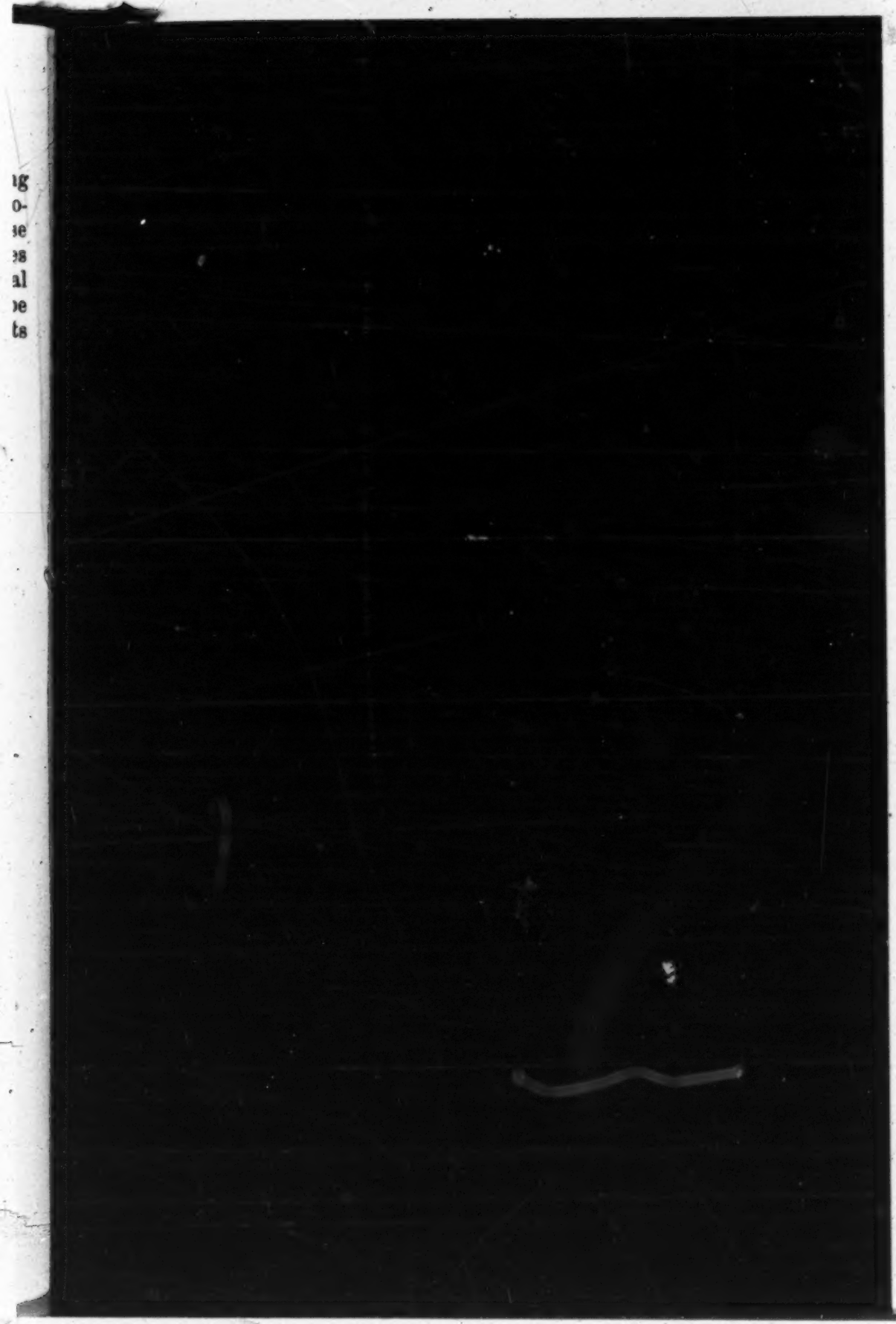

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 594

UNION PACIFIC RAILROAD COMPANY, A CORPORATION; CITY OF KANSAS CITY, KANSAS; DON C. McCOMBS, FRANCIS BLAKE AND GEORGE T. DARBY, COMMISSIONERS, ETC., ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL.,

Appellees.

STATEMENT OF APPELLANTS, THE CITY OF KANSAS CITY, KANSAS, DON C. MC COMBS, FRANCIS BLAKE AND GEORGE T. DARBY, COMMISSIONERS, ETC., AND ALTON H. SKINNER, TRUMAN SCHLUP AND HOWARD PAYNE AS TO OBJECTIONS TO ALLOWANCE OF MOTION TO CORRECT DIMINUTION OF RECORD FILED BY APPELLEES OTHER THAN THE UNITED STATES.

Come now the appellants, the City of Kansas City, Kansas, Don C. McCombs, Francis Blake and George T. Darby, Commissioners, etc., and Alton H. Skinner, Truman Schlup and Howard Payne, and state that their position with re-

gard to the matters contained in the motion to correct diminution of the record filed April 9th, 1941, as follows:

1. That the copies of the documents enumerated in said motion are true and correct copies of reports filed in the office of the Clerk of the District Court of the United States for the Western District of Missouri, Western Division, on the dates named in said motion.

2. That said documents were filed by the City of Kansas City, Kansas, in compliance with the order of said District Court contained in the order granting preliminary injunction and appearing in the paragraph beginning with the word "Fourth" on page 26 of Appellee's Motion.

3. That none of said documents were offered and received as evidence during the trial of said cause in said District Court.

4. That on May 11th, 1940, said documents and reports were called to the attention of the court and that on said date the court made certain remarks concerning the matters set out in said documents which are contained in the original stenographic report and typewritten copy of the same on file in the office of the Clerk of the Supreme Court of the United States, in volume I, transcript of permanent injunction, pages 1045 to 1051 both inclusive. A true and correct copy of the same is hereto attached and made a part hereof.

5. These appellants state that this Court is entitled, under its rules, to have made a part of the record the rulings of the trial court concerning the matters raised in the documents set out in said Motion of Appellees.

6. These appellants state that in the event the remarks and rulings of the court are considered with and made a part of the record concerning the documents enumerated

in Appellee's Motion, these appellants have no objection to the motion to correct diminution of the record filed by the appellees other than the United States of America filed on April 9th, 1941.

Respectfully submitted,

ALTON H. SKINNER,
BLAKE A. WILLIAMSON,
Counsel for The City of Kansas City, Kansas, Don C. McCombs, Francis Blake and George T. Darby, Commissioners, etc., and Alton H. Skinner, Truman Schlup and Howard Payne, Appellants.

DISTRICT OF COLUMBIA, SS:

Alton H. Skinner, being duly sworn, deposes and says that he is attorney for The City of Kansas City, Kansas, Don C. McCombs, Francis Blake and George T. Darby, Commissioners, etc., and Alton H. Skinner, Truman Schlup and Howard Payne, and his name is signed to the foregoing motion; that he has read the motion, knows the contents thereof, and that he knows them to be true.

ALTON H. SKINNER.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 11th day of April, 1941.

SAMUEL W. MCINTOSH,
[SEAL.] *Notary Public, D. C.*

My commission expires August 31, 1943.

VOLUME I.

TRANSCRIPT OF PERMANENT INJUNCTION

Pages 1045-1051

May 11, 1940.

The Court: During part of that time we may dispose of another matter. Mr. Skinner and Mr. Williamson called my attention yesterday evening to the fact that I had made no disposition of the request that they had made in their supplemental report, in which request they asked for directions as to what should be done with these tendered checks, checks tendered by these produce merchants. I was able to catch Mr. Gibson and Mr. Houts and Mr. Lehman and several others here in the building and told them that the matter would be taken up this morning. On reflection I do not believe it is necessary to take it up other than for me to indicate what my thoughts are about it, and if it is necessary afterwards for anything further to be done or said in connection with it, of course, you may do so.

I notice from this report that these produce dealers have offered checks in various amounts which they have tendered under protest, as the statement says, and in compliance with the order of this Court, and that in the tender the produce dealers state they are not in debt to the City of Kansas City, Kansas in any amount and that if the rental checks herein tendered are not acceptable in the amounts given they are to be returned. All I have to say about that to the produce dealers is this: That when I made this order, and used the language in the order providing that they should not be required to pay rents on uncompleted facilities to an extent greater than the extent of utilization of those facilities, I assumed that these men would deal fairly with the court. I

will assume that they are dealing fairly with the court in carrying out the spirit of the order until I learn to the contrary. But I notice in this engineer's report, a copy of which Mr. Williamson furnished me this morning, that a number of captious complainants and objections have been made to the engineer who was employed by the produce dealers to make this report, which complaints could not possibly have any real connection with the amount that the produce merchants owe the City for the rent on that property. I do not know to what extent captions, frivolous things of that kind enter into the engineers' report. I have not had an opportunity, other than very casually, to examine that report during the progress of this testimony here this morning in court.

But I think it is only necessary for me to say this: That if there are any strings tied to these offers to the City, they had better be untied, and the produce merchants had better, in good faith, in compliance with their own consciences as to what is a fair rental under the circumstances, pay the City the rent they owe the City and not place upon the City the responsibility of determining whether the amount offered is a correct amount. I would suspect that the merchants are not in a position to pay now less than the engineers' report says they should pay. It seems that the claim, as far as I can determine it as made to the engineers, that they do not owe the City anything, is based upon counterclaims, so to speak, set-offs, damages, expenses, matters that I am not concerned with and will not be concerned with. They are private matters between the City and the produce merchants. If the City promised them the world with a band around it, that is no concern of mine if they do not get it, or if they were promised it. The only concern that I have is that they shall not occupy those premises rent free until and unless the Supreme Court holds that I am wrong about the

law. And I am not undertaking to say now, and I will not undertake to say until the proper occasion arises, exactly what amount should be paid for an uncompleted unit. I realize that it is a very difficult matter of ascertainment. I apprehended that it would be practically impossible to ascertain the exact amount, but I expected the produce merchants to be fair about it and shall expect them to be fair about it, and I will take up on citation for contempt any obviously unfair attitude or any obvious attitude of ignoring the spirit of this restraining order.

The City, on the other hand, should accept the money that is paid by these produce merchants without any fear whatever on the part of the City officials that the court will criticize the City for accepting less than the full amount due. I am placing the responsibility on these produce merchants. They are the ones that seem to be asking for the rebates—not rebates, that may be misconstrued because of another manner in which the word has been used. They seem to be the ones asking for these deductions because of inconvenience caused them. In one instance I notice that because there was some noise going on while one of them was talking on the telephone, that inconvenienced and damaged him. Now, if that is not frivolous—I cannot imagine a frivolous claim being presented as a claim for damages—because they could not hear well on the telephone. Now, I am leaving that for these produce merchants, but it is their responsibility and it will be their responsibility on citation for contempt.

It is impossible for the City, it is impossible for the produce merchants, it is impossible for the Court to determine exactly what amounts should be paid on an uncompleted facility. I recognize that. I realize that. The only thing that they need do is to be fair about it and if there is any reasonable basis upon which to support the payment made

during this temporary condition, there will be no difficulty about any contempt citation. But an obvious disregard of the spirit of this restraining order will be dealt with on motion.

Is there anything else that can be done in that respect now, gentlemen? I will take up this question when I come back here the twenty-seventh, if it is necessary to take it up, as to the adequacy of these rentals on partially completed units. It may not be necessary. I realize that it will be a terrific problem to undertake to determine what each individual uncompleted unit should be charged.

I notice in this report, the engineers' report, there is a matter about which comment possibly should be made now, as some guide at least to the produce merchants, who, I realize are in a somewhat delicate position. I notice this engineers' report seems to base the amount of rental due on each individual unit upon the state of utilization or completion of a complete building. It is inconceivable to me, without the aid of demonstration from counsel or the engineer, how the average state of completion of a building can have any definite, direct bearing upon the degree of utilization of one of the units of that building.

It may be there is some definite relation, but I cannot conceive how the state of completion of the entire building will control the degree of the utilization of an individual unit of that building. I make that observation, because from the very casual examination of this engineers' report, it may be that the dealers had best use their own judgment about what amount should be paid.

If it is not necessary to go into that now, gentlemen, since it is so purely a temporary matter, and since by the twenty-seventh Mr. Skinner and Mr. Williamson tell me that they will probably be ready to report on the state of completion of all three of these buildings with more definiteness and be in a better position to know definitely where the City

stands and what attitude the City wishes to take, I will not take any further action about this now unless it is necessary to be done.

Is it, in the opinion of anyone, necessary that any further consideration be given to this temporary situation at this time?

MR. COSTOLOW: If the Court please, I think your Honor has stated the position of the Government in this matter, and I don't at the present time see any necessity for taking any action under those circumstances.

THE COURT: I want to say this in passing. Probably it is never proper for a Court to hear things out of the courtroom. Sometimes that happens. From what I have heard out of the courtroom, not improperly, but have read in the newspapers or heard casually, it occurs to me that there are parties involved in this lawsuit who feel that there is some danger of being cited for contempt and put in jail. I cannot conceive of any danger of such a thing to anyone who is acting in good faith and with a reasonable amount of judgment and intelligence in trying to carry out the spirit of this order. I certainly am not going to criticize the City of Kansas City, Kansas for accepting money paid by these tenants without committing themselves to whether or not that particular amount is the exact amount that should be paid, because I do not think I can say what exact amount should be paid. So long as everyone acts in good faith there will be no difficulty about it. If I had time to go through that engineers' report and found many instances where people complain about the rent being too high because they could not hear somebody over the telephone, I might change my opinion about whether everybody has been trying to be entirely fair about it.

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